CONCLUSION

For the reasons identified herein, Brooks respectfully urges the Commission to conclude and advise the FCC – pursuant to Section 271(d)(2)(B) – that an interLATA services application by SWBT for Oklahoma under current circumstances would be premature and should be rejected.

Respectfully submitted,
HALL, ESTILL, HARDWICK GABLE,
GOLDEN & NELSON, P.C.

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and

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ATTORNEYS FOR MOVANTS, BROOKS FIBER COMMUNICATIONS OF OKLAHOMA, INC. AND BROOKS FIBER COMMUNICATIONS OF TULSA, INC.

STATE OF MISSOURI)
.) SS.
COUNTY OF ST. LOUIS)

VERIFICATION

I, EDWARD J. CADIEUX, first being duly sworn, states on my oath that I am the Director, Regulatory Affairs - Central Region of Brooks Fiber Properties, Inc. (BFP). I am authorized to act on behalf of Brooks Fiber Communications of Oklahoma, Inc., and Brooks Fiber Communications Tulsa, Inc., (both wholly-owned subsidiaries of BFP) regarding the foregoing Initial Comments. I have read the aforesaid Initial Comments and I am informed and believe that the matters contained therein are true and correct to the best of my knowledge.

Dated:

Edward J. Cadieux

EDWARD J. CADIEUX

EDWARD J. CADIEUX appeared, and being first duly sworn upon his oath, stated that he is the Director, Regulatory Affairs - Central Region of Brooks Fiber Properties, Inc. (BFP) and that he signed the foregoing document as Director, Regulatory Affairs - Central Region of Brooks Fiber Properties, Inc., and the facts contained therein are true and correct according to the best of his knowledge.

IN WITNESS WHEREOF, I have set my hand and affixed my official seal in the aforesaid County and State on the above date.

Dated: March 10, 1997

S. E. Cundiff Hannick

NOTARY PUBLIC

My Appointment Expires: October 11, 1999

BEFORE THE CORPORATION COMMISSION OF THE STATE OF OKLAHOMA

APPLICATION OF ERNEST G. JOHNSON, DIRECTOR OF THE PUBLIC UTILITY DIVISION, OKLAHOMA CORPORATION COMMISSION TO EXPLORE THE REQUIREMENTS OF SECTION 271 OF THE TELECOMMUNICATIONS ACT OF 1996	§	Cause No. PUD 970000064

STATEMENT OF PRACTICE

I. INTRODUCTION AND QUALIFICATIONS

1. I, Austin C. Schlick, state that I am a member of the Bars of the District of Columbia, the Supreme Court of Pennsylvania and the United States Court of Appeals for the Sixth Circuit.

2 Roger K. Toppins, an active member of the Oklahoma Bar Association (OBA #15410), a resident of the state of Oklahoma and whose office address is 800 North Harvey, Room 310, Oklahoma City, Oklahoma 73102, is associated with me in this proceeding. Mr. Toppins has entered an appearance in this proceeding.

Austin C. Schlick

CERTIFICATE OF MAILING

On this 25th day of March, 1997, a true and correct copy of the foregoing was mailed, postage prepaid, to:

John Gray
Oklahoma Corporation Commission
Jim Thorpe Building
Oklahoma City, OK 73105

Martha Jenkins
8140 Ward Parkway, 5E
Kansas City, MO 64114

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Sue L Scott

BEFORE THE CORPORATION COMMISSION OF THE STATE OF OKLAHOMA

APPLICATION OF ERNEST G. JOHNSON, DIRECTOR OF THE PUBLIC UTILITY DIVISION, OKLAHOMA CORPORATION COMMISSION TO EXPLORE THE REQUIREMENTS OF SECTION 271 OF THE TELECOMMUNICATIONS ACT OF 1996	§	Cause No. PUD 970000064

STATEMENT OF PRACTICE

I. INTRODUCTION AND QUALIFICATIONS

1. I, Michael K. Kellogg, state that I am a member of the Bars of the District of Columbia, the District of Columbia Superior Court, the United States District Court for the District of Columbia, the United States Court of Appeals for the District of Columbia, the United States Courts of Appeals for the Second, Fifth, Sixth, Seventh, Eighth and Ninth Circuits, and the United States Supreme Court.

2 Roger K. Toppins, an active member of the Oklahoma Bar Association (OBA #15410), a resident of the state of Oklahoma and whose office address is 800 North Harvey, Room 310, Oklahoma City, Oklahoma 73102, is associated with me in this proceeding. Mr. Toppins has entered an appearance in this proceeding.

Michael K. Kellogg /lag

Michael K. Kellogg

CERTIFICATE OF MAILING

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/Helen L Scott

BEFORE THE CORPORATION COMMISSION OF THE STATE OF OKLAHOMA

APPLICATION OF ERNEST G. JOHNSON, DIRECTOR OF THE PUBLIC UTILITY DIVISION, OKLAHOMA CORPORATION COMMISSION TO EXPLORE THE REQUIREMENTS OF SECTION 271 OF THE TELECOMMUNICATIONS ACT OF 1996	§	Cause No. PUD 970000064

STATEMENT OF PRACTICE

I. INTRODUCTION AND QUALIFICATIONS

1. I, Jonathan T. Molot, state that I am a member of the Bars of the District of Columbia, the Commonwealth of Massachusetts and the State of New York.

2 Roger K. Toppins, an active member of the Oklahoma Bar Association (OBA #15410), a resident of the state of Oklahoma and whose office address is 800 North Harvey, Room 310, Oklahoma City, Oklahoma 73102, is associated with me in this proceeding. Mr. Toppins has entered an appearance in this proceeding.

Jonathan T. Molot

CERTIFICATE OF MAILING

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BEFORE THE CORPORATION COMMISSION OF THE STATE OF OKLAHOMA

IN THE MATTER OF APPLICATION OF ERNEST G. JOHNSON, DIRECTOR OF THE PUBLIC UTILITY DIVISION, OKLAHOMA CORPORATION COMMISSION TO EXPLORE THE REQUIREMENTS OF SECTION 271 OF THE TELECOMMUNICATIONS ACT OF 1996	)	Cause No. PUD 970000064

REPLY COMMENTS OF SOUTHWESTERN BELL TELEPHONE COMPANY IN SUPPORT OF COMMISSION ENDORSEMENT OF FULL INTERLATA COMPETITION IN OKLAHOMA

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March 25, 1997

INTRODUCTION AND SUMMARY

Southwestern Bell Telephone Company ("SWBT") demonstrated by submitting a draft section 271 application and Initial Comments that it, SBC Communications Inc., and Southwestern Bell Long Distance ("SBLD") — together, "Southwestern Bell" — have satisfied all requirements for providing interLATA services in Oklahoma. Incumbent interexchange carriers and one local competitor nevertheless urge this Commission to advise the FCC that Southwestern Bell has not met the Act's requirements. To preserve their own profits from an infusion of competition, the interexchange carriers in particular would effectively redraft the Telecommunications Act of 1996, and undermine Congress' core judgment that Bell companies should be permitted to enter the in-region, long distance business once they take specific steps to facilitate local competition.

At every opportunity, the interexchange carriers twist the Act so as to make timely Bell company interLATA entry impossible. First, they misread 47 U.S.C. § 271(c)(1) so that *any* request for local interconnection would disqualify Southwestern Bell from applying for interLATA relief on the basis of its Statement of Terms and Conditions ("STC") under subsection 271(c)(1)(B), but almost *no* request for interconnection would enable Southwestern Bell to apply for interLATA relief pursuant to interconnection agreements under subsection 271(c)(1)(A). Their interpretation would essentially read the so-called "B Track" out of the Act. Not satisfied with eliminating subsection (B), the interexchange carriers seek to sabotage entry under subsection (A) as well, by misconstruing its "facilities-based" test to require a particular quality and quantity of local competition. Congress

directly rejected such litmus tests in favor of a requirement that, under subsection (A), Bell companies simply provide interconnection and access to a facilities-based carrier pursuant to a state-approved agreement.

Opponents misapply the competitive checklist as well. Specifically, the major interexchange carriers would expand the checklist with a requirement that facilities-based carriers actually purchase all 14 items from Southwestern Bell. This would violate section 271(d)(4)'s express prohibition on expanding the checklist. It also would confuse the requirement in section 271(c)(1)(A) that a facilities-based carrier's interconnection agreement be implemented, with the distinct and independent requirement of section 271(c)(2) that interconnection and access be provided to a particular carrier or generally offered in accordance with the competitive checklist. Finally, the interexchange carriers' requirement that CLECs take *all* 14 items would condition checklist compliance not simply upon the nature of local competition — which alone would be unlawful — but upon the emergence of a particular form of competition that may never arise. In Oklahoma, for example, competitive local exchange carriers ("CLECs") such as Brooks Fiber may opt to rely upon their own networks and facilities rather than purchase all 14 checklist items from Southwestern Bell. Congress did not condition Bell company interLATA entry upon the business plans of potential competitors, but rather created the competitive checklist precisely to provide the Bell companies with an attainable goal that is within their control.

The Commission should reject efforts to delay long distance competition in Oklahoma and instead advise the FCC that Southwestern Bell has fulfilled all of section 271(c)'s

requirements. Southwestern Bell is providing access and interconnection pursuant to an agreement with Brooks Fiber — a carrier that provides local telephone exchange service to both residential and business customers and offers such service over its own facilities. If the Commission finds that Brooks Fiber is a qualifying, facilities based carrier, Southwestern Bell may proceed under section 271(c)(1)(A). If the Commission finds instead that there are no qualifying carriers in Oklahoma, then Southwestern Bell may proceed under section 271(c)(1)(B) on the basis of its effective STC. Regardless, Southwestern Bell has demonstrated compliance with the competitive checklist of section 271(c)(2). The interconnection and access that SWBT makes available through its OCC-approved interconnection agreements and its STC include all 14 items of the checklist.

To the extent that the Commission considers whether Southwestern Bell's interLATA entry will serve the public interest — a question that falls outside of its responsibility to advise the FCC regarding Southwestern Bell's satisfaction of section 271(c) — there is only one proper conclusion. Southwestern Bell will infuse competition into the interLATA services business in Oklahoma, just as other incumbent local exchange carriers are doing where they are allowed to compete. The result will be lower prices and higher-quality services for ordinary Oklahomans, and faster economic growth for the State.

DISCUSSION

Congress wanted to foster local and interexchange competition, and it wanted consumers to benefit from both as soon as possible. It therefore drafted the 1996 Act so as to provide parallel entry opportunities for new competitors in local service markets and for

Bell companies seeking to augment interLATA competition. As the FCC has explained "the statute links the effective opening of competition in the local market with the timing of BOC entry into the long distance market."[1]

In order to promote rapid entry in all markets, Congress rejected proposals that would have tied Bell company in-region, interLATA entry to the *quantity* or *quality* of local competition. For example, one proposal to incorporate an "actual and demonstrable competition" requirement was withdrawn after its sponsor determined that it "was not going to go anywhere." 141 Cong. Rec. S7972, S8009 (daily ed. June 8, 1995) (statement of Sen. Hollings). Likewise, Senator Kerrey proposed an amendment that would have changed section 271(c)(1) to provide that "a Bell operating company may provide interLATA services in accordance with this section only if that company has reached interconnection agreements under section 251 . . . with telecommunications carriers capable of providing a substantial number of business and residential customers with" service. 141 Cong. Rec. S8310, S8319 (daily ed. June 14, 1995). That proposed amendment was defeated, as was a House amendment that would have required competitors to offer local services to 10 percent of

[1] *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended*, CC Dkt No. 96-149, ¶ 8 (rel. Dec. 24, 1996) ("*Non-Accounting Safeguards Order*"); *see* First Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Dkt. No. 96-98, at ¶ 4 (rel. Aug. 8, 1996) ("*Local Interconnection Order*") (opening of local exchange "is intended to pave the way for enhanced competition in" long distance), *appeal pending sub. nom. Iowa Utils. Bd. v. FCC*, No. 96-3321 (8th Cir. arg. Jan. 17, 1997).

customers as a prerequisite to Bell company interLATA entry. *See* 141 Cong. Rec. H8425, H8454 (daily ed. Aug. 4, 1995) (statement of Rep. Bunn).

Commenters in this proceeding — and the interexchange carriers in particular — would have regulators impermissibly override legislators and adopt the approach that Congress rejected. When describing Southwestern Bell's eligibility to file an application with the FCC under section 271(c)(1), and its compliance with the competitive checklist of section 271(c)(2), Sprint, AT&T, and MCI try to add various requirements that simply do not apply: *e.g.*, that markets be "effectively competitive,"[2] that there be "meaningful competition,"[3] "commercially operational" competition,[4] "effective competition,"[5] and "competition across substantial portions of the state,"[6] that Southwestern Bell "has completed an interconnection agreement with AT&T that the Commission approves,"[7] and that CLECs "actually have the

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[2] Sprint's Legal Memorandum Relative to the Application by SBC Communications, Inc., Southwestern Bell Telephone Company, and Southwestern Bell Long Distance for Provision of In-Region, InterLATA Services in Oklahoma at 18 (filed Mar. 11, 1997) ("Sprint").

[3] Statement of Edwin P. Rutan, II on Behalf of AT&T Communications of the Southwest ¶ 10 (filed Mar. 11, 1997) ("AT&T's Rutan").

[4] *Id.* ¶ 23.

[5] Statement of John W. Mayo on Behalf of AT&T Communications of the Southwest ¶ 67 (filed Mar. 11, 1997) ("AT&T's Mayo").

[6] Statement of Frederick R. Warren-Boulton on Behalf of AT&T Communications of the Southwest, Inc. and MCI ¶ 56 (filed Mar. 11, 1997) ("AT&T/MCI's Warren-Boulton").

[7] Statement of Nancy Dalton on Behalf of AT&T Communications of the Southwest ¶ 23 (filed Mar. 11, 1997) ("AT&T's Dalton").

capabilities on a commercially operational bas[i]s to provide local service on a broad basis with a large volume of transactions."[8] In proposing these open-ended tests, the interexchange carriers ignore Congress' decision to reject *all* tests of actual competition in favor of "a test of when markets are open." 141 Cong. Rec. S8188, S8195 (daily ed. June 12, 1995) (statement of Sen. Pressler) .

The interexchange carriers further attempt to twist the eligibility requirements of section 271(c)(1) and the competitive checklist of section 271(c)(2) to make timely Bell company interLATA entry impossible. The interexchange carriers seek to prevent any Bell company from *ever* receiving interLATA entry on the basis of a statement of terms and conditions under section 271(c)(1)(B). They would accomplish this feat — and require Bell companies to wait for facilities-based local competition in every state — by urging that a pending "request" from *any* CLEC bars a Bell company from proceeding under subsection (B), even though the exclusionary language of subsection (B) refers only to requests from facilities-based carriers that serve both residential and business customers. Moreover, even where a Bell company *does* interconnect with a qualifying facilities-based CLEC, the interexchange carriers seek to sabotage Bell company entry by expanding the competitive checklist — in violation of section 271(d)(4) — to include a requirement that the CLEC actually purchase and utilize all 14 checklist items. The interexchange carriers disguise this maneuver behind "implementation" language from section 271(c)(1)(A). But the

[8] *Id.*

"implementation" language of section 271(c)(1) simply requires that a facilities-based carrier be present to prove that entry is viable. It has no bearing upon whether Southwestern Bell's interconnection and access meet the 14 checklist requirements of section 271(c)(2).

These misreadings of the law are part of a simple strategy to prevent genuine competition in long distance. This Commission should reject the interexchange carriers' efforts to subvert congressional intent and the public welfare. The Commission should apply section 271(c)(1) and section 271(c)(2) as Congress drafted them, not as the interexchange carriers *wish* they had been drafted, and thereby give effect to Congress' intent to open local and long distance markets as soon as possible.

I. SOUTHWESTERN BELL IS ELIGIBLE TO APPLY FOR INTERLATA RELIEF UNDER SECTION 271(c)(1)

Congress granted Bell companies the option of relying upon actual interconnection agreements or a generally available statement of terms and conditions in order to ensure that Bell companies could open their local markets and enter the interLATA business quickly. Both of the two avenues to interLATA entry under section 271(c)(1) independently ensure that barriers to local entry have been lowered. Where a Bell company relies upon an effective statement of generally available terms and conditions, by definition the STC's terms are available to all new entrants throughout Oklahoma. Section 271(c)(1)(B) therefore permits interLATA entry on the basis of a statement of terms and conditions, regardless of whether any CLECs have taken the Bell company up on the STC's offers of interconnection and access. Alternatively, under section 271(c)(1)(A), a single interconnection agreement

with a qualifying, facilities-based local carrier anywhere in a state suffices to demonstrate that the Bell company's markets are open. The terms of the agreement are available to all other CLECs on a nondiscriminatory basis (47 U.S.C. § 252(i)), and if one facilities-based carrier found entry feasible under the terms of the agreement, there is no reason why others could not follow. Section 271(c)(1)(A) thus is satisfied when the Bell company actually "is providing access and interconnection" to a facilities-based CLEC pursuant to a state-approved agreement.

In its Draft Brief and Initial Comments, Southwestern Bell demonstrated that by providing interconnection and access to Brooks Fiber — a qualifying, facilities-based carrier — pursuant to an OCC-approved interconnection agreement, Southwestern Bell had satisfied section 271(c)(1)(A).[9] Southwestern Bell also explained that if the FCC finds Brooks Fiber *not* to be a qualifying, facilities-based carrier under subsection (A) for any reason, Southwestern Bell would be able to proceed on the basis of its effective STC under section 271(c)(1)(B).[10] Either way, Southwestern Bell has opened its local markets in Oklahoma

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[9] Draft Brief in Support of Application by SBC Communications Inc., Southwestern Bell Telephone Company, And Southwestern Bell Long Distance For Provision of In-region, InterLATA Services in Oklahoma at 8-10 ("Draft Br."); Initial Comments and Legal Memorandum of Southwestern Bell Telephone Company In Support of Endorsement of Full InterLATA Competition in Oklahoma at 4-5 (filed Mar. 11, 1997) ("SWBT Comments").

[10] Draft Br. at 10-12; Southwestern Bell Initial Comments at 5. Southwestern Bell's STC became effective on March 17, 1997, after the expiration of the 60-day review period established by section 252(f).

to competitors, and therefore is eligible to apply for and receive interLATA authority for the State under section 271(1)(c)(1).

Some commenters question Southwestern Bell's eligibility to apply for interLATA relief under section 271(c)(1). These commenters take two directly contradictory positions: (i) that Brooks Fiber is *not* a "qualifying" facilities-based carrier for purposes of allowing Southwestern Bell's interLATA entry under subsection (A)[11] and (ii) that Brooks Fiber *is* "such provider" for purposes of blocking Southwestern Bell's interLATA entry under subsection (B).[12] These positions cannot both be correct. As explained below, Southwestern Bell believes that it is eligible to apply under subsection (A). But, if the FCC were to hold otherwise, then it would have to find that Southwestern Bell is eligible to apply under subsection (B).

A. Brooks Fiber Is a Qualifying, Facilities-Based Carrier

A Bell company may apply for in-region, interLATA authority under section 271(c)(1)(A) if it has implemented a state-approved interconnection agreement with an unaffiliated competing local carrier that (1) "provide[s]" "telephone exchange service . . . to business and residential subscribers" and (2) "offer[s]" telephone exchange service "exclusively . . . or predominantly over [its] own telephone exchange service facilities."

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[11] Initial Comments of Brooks Fiber Communications of Oklahoma, Inc. and Brooks Fiber Communications of Tulsa, Inc. at 11 (filed Mar. 11, 1997) ("Brooks Fiber"); *see also* Sprint at 10-21 (seeking to narrow definition).

[12] Brooks Fiber at 8-9; *see* Sprint at 9-10; AT&T's Rutan ¶ 17; Comments of the Oklahoma Attorney General at 5 (filed Mar. 11, 1997) ("OAG").

No one disputes that Southwestern Bell "is providing access and interconnection to its network facilities for the network facilities" of Brooks Fiber, an unaffiliated provider of telephone exchange service, pursuant to an agreement that has "been approved under section 252." 47 U.S.C. § 271(c)(1)(A). Commenters focus instead upon whether Brooks Fiber meets the "business and residential subscribers" and "facilities-based" requirements of section 271(c)(1)(A). As explained below, Brooks Fiber makes undisputed factual assertions that, if true, would establish that it is a "qualifying" carrier under section 271(c)(1)(A).

1. Subsection (A) requires that Brooks Fiber be a "provider of telephone exchange service . . . to residential and business subscribers." § 271(c)(1)(A). Brooks Fiber states that it has received authority to "provid[e] all types of intrastate switched services, including switched local exchange (*i.e.*, dial-tone) service," and that it actually furnishes local exchange service to both residential and business customers in Tulsa and Oklahoma City. Brooks Fiber at 1-2. The "residential and business subscribers" test is thus satisfied.

Section 271(c)(1)(A) places no floor on the number of residential or business customers that must actually be served. As noted above, Congress expressly rejected any such litmus test of the extent of local competition. Yet, in direct defiance of congressional intent, AT&T proposes a "meaningful numbers" test, AT&T's Rutan ¶ 34; AT&T and MCI together would require "competition across substantial portions of the state for both residential and business customers," AT&T/MCI's Warren-Boulton" ¶ 56; and Sprint urges the Commission to consider whether Brooks Fiber and other CLECs are sufficiently

"presen[t]" to justify Southwestern Bell's interLATA entry, Sprint at 11. *There is no legal basis for these proposed tests*. Even Sprint concedes that "Congress did not intend that the [business and residential customers] test should turn on any specific quantitative measure of the competitive LECs' market presence." *Id.* The Commission must respect Congress' express instructions and find that, because Brooks Fiber serves some business and some residential subscribers, it satisfies the "residential and business subscribers" requirement of section 271(c)(1)(A).

2. Under section 271(c)(1)(A), Brooks Fibers' local service "may be offered . . . either exclusively over [Brooks Fiber's] own telephone exchange service facilities or predominantly over [its] own telephone exchange service facilities in combination with the resale of the telecommunications services of" Southwestern Bell. Brooks Fiber not only "*offer[s]*" service over its own network — thereby fulfilling this requirement — but actually *furnishes* service to customers exclusively over that network. Brooks Fiber at 2.

Because Brooks Fiber, by its own account, serves customers *exclusively* over its existing network, the Commission need not linger on the interexchange carriers' efforts to redefine "predominantly." Brooks Fiber serves business customers over its own fiber optic network and switches, *without* taking *any* unbundled elements from Southwestern Bell. Brooks Fiber at 2. Brooks Fiber also offers service to residential customers on the same basis (although it actually serves residential customers only through resale). Brooks Fiber at 3 (resale "a secondary method"). These facts should end the Commission's inquiry under section 271(c)(1)(A).

Even if Brooks Fiber did not serve some customers entirely over facilities not obtained from Southwestern Bell, but instead served all of its customers by combining its own switches and trunks with Southwestern Bell's T-1 access, it *still* would satisfy the "predominantly" facilities-based requirement. The point of the "predominantly" facilities-based requirement was to screen out "a competitor offering service *exclusively* through the resale of the BOC's telephone exchange service." Conf. Rep. at 148 (emphasis added). As the legislative history quoted by Sprint makes clear, Congress recognized that new competitors are unlikely to have their own "fully redundant network[s]" and, at least at the outset, may need to purchase "[s]ome facilities and capabilities (*e.g.*, central office switching)" from the incumbent LEC. Sprint at 13 (quoting Conf. Rep. at 148). Legislators intended that these carriers would be treated as facilities-based competitors for purposes of Bell company interLATA entry. Conf. Rep. at 148.

Brooks Fiber ignores the language of the law in asserting that the "predominance" test of subsection (A) requires the Commission to compare the size and features of Brooks Fiber's overall network with SWBT's network. Brooks Fiber at 11. The Act places sole focus on the facilities used by the CLEC. Moreover, under Brooks Fiber's approach, a CLEC could serve hundreds or thousands of customers in Oklahoma exclusively over its own network and yet would not qualify as a facilities-based competitor until its network matched SWBT's in scope.

So too, AT&T is wrong when it attempts to turn the "predominantly facilities-based" requirement into a test of "meaningful" competition. AT&T's Rutan ¶ 10. As noted above,